

**ABIL**

Arizona Bridge to Independent Living
1229 E. Washington, Phoenix, AZ 85034

December 22, 2003

Social Security Administration
Office of Regulations
100 Altmeyer Building
6401 Security Blvd.
Baltimore MD 21235

Re: Response to NPRM on "Reinstatement of Entitlement to Disability Benefits"

Please accept the attached comments as our official response to the Notice of Proposed Rulemaking on "Reinstatement of Entitlement to Disability Benefits" under the Ticket to Work and Work Incentives Improvement Act.

We appreciate your consideration of our comments.

Sincerely,

Susan Webb
Director
ABIL Employment Services

**Comments on Proposed Rules for Expedited Reinstatement
ABIL Employment Services
December 19, 2003**

The Ticket to Work Legislation and the proposed rules for Expedited Reinstatement (EXR) are silent relative to interactions with the Ticket to Work Program (TTW). There is one major conflict and there are several adverse issues relative to the TTW Program and the proposed EXR rules. Some of the issues listed below will require statutory change. However, we believe the Commissioner of Social Security has the authority to resolve the major conflict (#1) through use of the regulatory process.

We have also attached an actual case study of one specific case illustrating the problems with the interactions and how it affects the EN and the beneficiary/ticket user.

Problem Statements:

1. EXR and CDR Protections:

The TTW Program protects beneficiaries from Medical Continuing Disability Reviews (CDR) throughout the time he or she has a Ticket deposited with an Employment Network (EN) and is making timely progress. If the TTW Program participant (i.e. ticket user) completes the Extended Period of Eligibility¹ while the TTW is deposited and then stops working due to his or her medical condition, the participant may file for EXR, thus immediately starting provisional benefits payable for up to six months. The conflict arises because the TTW protects the beneficiary from being subjected to a medical CDR but the EXR provisions require that a medical CDR be completed to establish eligibility for continued benefits.² This is a direct conflict between the two provisions. The recommendations we make below can be achieved through the rulemaking process and we encourage SSA to include them in the final rule.

The reason we believe this can be handled in the regulatory process and does not require a statutory change is found in the EXR provisions of Sec. 112(2)(A)(i) "A request for reinstatement shall be filed in such form, and containing such information, as the Commissioner may prescribe. [emphasis added]"

¹ The Extended Period of Eligibility applies to Title I beneficiaries who complete a 9-month Trial Work Period after becoming employed above the Substantial Gainful Activity level. The EPE lasts for 36 months whether the beneficiary is working or not. If the beneficiary is not working during the month the EPE ends, SSDI benefits will continue following the last month of the EPE. However, if the EPE has ended, cash benefits stop immediately if the beneficiary is working above SGA or stop the first month after the beneficiary exceeds the SGA due to earned income.

² See attached case history example. This example is a case currently pending.

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Therefore, the Commissioner has the authority to prescribe what must be filed by the beneficiary and what information it must contain. This section goes on to explain further in Sec. 112(2)(A)(ii) "A request for reinstatement shall include express declaration by the individual [emphasis added] that the individual meets the requirements specified in clauses ii) and (iii) of paragraph (1)(B)." Nowhere does it say that the Commissioner must perform a CDR to determine whether the individual is entitled to EXR (i.e. reinstatement of benefits). By not addressing this conflict in the proposed rules, the Commissioner is totally ignoring the specifically mandated provisions under a different section of the statute that clearly prohibits CDRs for ticket users.

2. EXR Eligibility Due to Medical Condition:

The proposed EXR rules specify that to be eligible for reinstatement of benefits the beneficiary must have stopped working due to his or her medical condition and the medical condition must be the same as or related to the disability for which the beneficiary was originally found eligible for benefits. We realize this is almost verbatim from the statute; however, the Commissioner has exercised her authority through rulemaking to add "special circumstances" as a reason for EXR eligibility. We believe that if the Commissioner believes she has the authority to add this provision when the law is silent, she also has the authority to resolve the conflict(s) between the TTW Program and the EXR provisions since the law is silent. One of the major fears beneficiaries have is trying work, not being able to do the work (whether directly because of a medical condition or not), and then not being able to get his or her cash benefits reinstated. Our experience during nearly two years of operating as an EN under the TTW Program indicates that ticket users frequently move in and out of employment. There may be several months between jobs due to market factors and other considerations having nothing to do with the ticket user's medical condition. This EXR restriction coupled with the medical CDR requirement discourages a beneficiary from attempting to work and leave the rolls.

3. Effect of EXR on EN Willingness to Continue Services

The proposed EXR rules discourage an EN from continuing to provide services to a TTW participant who has filed for EXR. If a TTW participant stops working for any reason, the EN no longer receives milestone/outcome payments. This is a provision in the TWWIA designed to encourage an EN to continue providing return to work services throughout the 60-month period during which outcome payments are made. If a beneficiary loses his or her job for any reason, it is in the

best interest of the beneficiary, the EN and SSA to get that person back to work again as quickly as possible. However, if the beneficiary applies for EXR (especially if work ended due to reasons other than a medical condition), the EN will be reluctant to continue investing time and resources into that beneficiary if the possibility exists that the beneficiary will be found ineligible for benefits, thus terminating the ticket. This provision encourages the EN to stop services for up to the six months during the provisional payment period before again providing services. This lag time could seriously impact the beneficiary's willingness to look for work during the time his or her EXR status is being determined.

If the beneficiary is subsequently found ineligible for benefits under the EXR provisions, he or she may file a new disability claim and the eligibility for benefits is determined using the new claim disability determination rules instead of the Medical Improvement Expected (MIE) rules used in the EXR determination. Even though the five-month waiting period for a new claim will not apply if the beneficiary is within a 60-month period since receiving cash benefits, this still requires an additional lag time for a new determination to be made. If it takes up to six months to determine eligibility for EXR and adds another indeterminate amount of time for a new claim to be decided, this further discourages the beneficiary and the EN from continuing to work together. Some have argued there is an advantage in this scenario because a new ticket will be issued when the beneficiary is found eligible as having a new period of disability. There is some legitimacy to that argument. However, the main purpose of TWWIA is to keep people off the rolls. These provisions work directly against that goal.

In addition to the time lag, if a new ticket is issued, it terminates the old ticket under which an EN has provided services. Therefore, if the beneficiary decides to deposit the new ticket with a different EN, the original EN who provided a significant amount of services will not be eligible for a split payment with the new EN.

4. The proposed EXR rules specify a 24-month initial reinstatement period following a determination that the beneficiary is entitled to reinstatement under the EXR provisions. During this 24-month period, the beneficiary will have a new ticket but will not be eligible for a new Trial Work Period or Extended Period of Eligibility. Once again, the individual will be discouraged from attempting work during this period. If he or she begins work above SGA, his or her benefits will immediately cease and the rules further prohibit the individual from being eligible for another EXR determination during that period. The message is: "Work and you're done if you fail. You can file a new claim but

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you'll have to wait without any income until we make a new disability determination."

Recommendations:

1. We support the proposed EXR rules for beneficiaries who are not participating in the TTW Program and do not have a Ticket deposited with an Employment Network at the time the EXR claim is filed.
2. We believe that all of the above issues discourage a beneficiary from using a TTW or the EXR provisions, both of which are part of TWWIA and are intended to encourage employment. All of these issues can be resolved if SSA adds a section to the proposed EXR rules that applies specifically to users of the TTW Program. We recommend that the new section specify the following:
 - A.. TTW Program participants may have their benefits immediately reinstated if they are no longer able to work for any reason so long as they have their ticket deposited with an EN and are making timely progress under the TTW rules. By eliminating the requirement to judge eligibility based upon the reason for leaving the job, the need for a medical review ceases. Thus the conflict between the CDR protections of the TTW Program and the EXR provisions no longer exists.

Special Note: Since the TTW Program applies to both SSI and SSDI beneficiaries, simply extending the EPE to coincide with in-use status of a ticket would not be sufficient as the EPE does not apply to SSI beneficiaries.
 - B. If the ticket user subsequently unassigns his or her ticket and does not reassign it within the 90 days currently required in the existing rules, then a medical CDR will automatically be triggered at that point.
 - C. Ticket users may move in and out of benefits whenever they fall below SGA in any given month as long as their ticket is still assigned. This would be particularly beneficial to those beneficiaries whose work is episodic at first.
3. The other provision in the proposed rules that is clearly statutory is the 24-month initial reinstatement period when exercising EXR. But that actually is okay relative to ticket users since they only have two years of having their original ticket assigned to go to work or they are not making timely progress. If the benefit reinstatement can be made without a CDR, ENs won't have the risk of

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not knowing whether to provide services or not. If the ticket user is automatically reinstated and does not go back to work within the 24-month initial reinstatement period, the EN probably doesn't want to continue serving them anyway. Therefore, this provision in the proposed rules should apply to all beneficiaries, whether using a Ticket or not.

EXR Case Study December, 2003

Consumer Name:	Jane Doe
Primary Disability:	Blindness
Secondary Disability:	Diabetes
Ticket assigned to ABIL	August, 2002
Consumer Begins Working Above Blind SGA:	October, 2002
EPE Ends:	April, 2003
Employment Terminates:	September, 2003

Case Narrative:

Jane Doe was receiving both SSI and SSDI concurrently as well as childrens' SSI. She accepted a position through the TTW Program at a salary of \$25,000 per year. Shortly after beginning her new job, the EN purchased approximately \$3,000 in assistive devices for her job. In addition, the EN provided 225 hours of other counseling and advocacy services at a cost of \$1246. The EN also accompanied Jane to the SSA Field Office to help resolve an overpayment. A Work Activity Report was completed with the help of the EN. SSI and SSDI cash benefits immediately stopped and an overpayment was forgiven due to the fact that the consumer did not know she could have used IRWEs a few years ago and may not have been considered to be working above the blind SGA at the time if she had used them. There was also confusion about when the blind SGA had been used to calculate her benefit status or when the non-blind SGA was used.

After one year on the job Jane was terminated by her employer for non-performance. Her non-performance was not related to her disability. She told the EN she still wanted help from them to find another position. The EN advised her about filing for EXR and also filing a new claim. Jane decided to file for EXR because she would start receiving provisional benefits right away rather than having to wait until a new claim is decided.

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The EN contacted MAXIMUS to find out how this would affect the TTW. MAXIMUS advised that the ticket is still good and is still assigned during an EXR filing. MAXIMUS has not yet advised the EN what happens to that ticket if the beneficiary is found ineligible for EXR and needs to file a new claim.

After already investing \$4,246 in this beneficiary with only two milestone payments having been received and two more pending, the EN is still providing job search services to this beneficiary to hopefully get her back to work before the EXR decision is made. The EN believes that Jane will file for a new claim if the EXR is not approved. The EN believes that Jane's disability will qualify her for a new period of disability and expects that a new ticket will ultimately be issued if Jane is not working by that time. However, the EN believes that Jane is a savvy consumer and will not deposit her new ticket with the current EN. She will likely deposit her ticket with a national EN that offers a percentage of the payments to the beneficiary. Since the current EN is providing services under the first ticket, they will have no standing to request split payments with the new EN under the new ticket.

The EN is currently considering unassigning Jane's ticket and accepting the loss rather than continuing to provide services for which there is a significant likelihood they will not be reimbursed and costs will continue to mount up. It should be noted that the assistive devices purchased for Jane are still the property of the EN and can be assigned to Jane again if she gets another job and as long as Jane's TTW is still assigned to them. The equipment could also be used at some point on behalf of a different ticket user who might need the same equipment. Consequently, the EN is not considering the cost of the equipment as a total loss.